U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-T-, LLC

DATE: OCT. 12, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of information technology development and consulting services, seeks to permanently employ the Beneficiary as a computer systems analyst.[1] It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

On May 18, 2015, the Director, Texas Service Center, denied the petition. The Director concluded that the record did not establish the Beneficiary's educational qualifications for the requested classification and the offered position.

The matter is now before us on appeal. We agree with the Petitioner that the Beneficiary has, as required for the offered position and the requested classification, a foreign degree equivalent to a U.S. bachelor's degree followed by 5 years of progressive experience in the specialty. But, because the record does not establish the Petitioner's ability to pay the proffered wage, we will remand the matter to the Director for further proceedings.

I. LAW AND ANALYSIS

A. USCIS' Role in the Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, a foreign national must apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

[1] The accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), identifies the offered position as "Technical Consultant." But the Form I-140, Immigrant Petition for Alien Worker, states the job title as "Computer Systems Analyst." We will therefore refer to the position as computer systems analyst.

By approving the accompanying ETA Form 9089 in the instant case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of computer systems analyst. *See* section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(II).

The issues before us are whether the Beneficiary meets the requirements of the offered position certified by the DOL and whether the Petitioner and the Beneficiary otherwise qualify for the requested classification. *See, e.g., Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service "makes its own determination of the alien's entitlement to [the requested] preference status").

B. The Beneficiary's Educational Qualifications

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. 8 C.F.R. §§ 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *See K.R.K. Irvine, Inc.* v. *Landon,* 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany* v. *Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc.* v. *Coomey,* 661 F.2d 1, 3 (1st Cir. 1981).

Also, the job offer portion of an accompanying labor certification must demonstrate that the job requires a professional holding an advanced degree. 8 C.F.R. § 204.5(k)(4)(i). The term "advanced degree" means "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

In the instant case, the accompanying labor certification states that the minimum requirements of the offered position of computer systems analyst include a U.S. bachelor's degree or a foreign equivalent degree in computer science, computer information systems, management information systems, engineering, or a related field. The position also requires 60 months, or 5 years, of experience in the job offered or as a programmer/programmer analyst, systems analyst, SAP technical consultant, or a related occupation.

The Beneficiary attested on the labor certification to his receipt of a bachelor of engineering degree in computer science in 2004 from the [redacted] India. The record contains a copy of a bachelor of engineering degree and transcripts indicating the

Beneficiary's completion of an undergraduate program in computer science and engineering in April 2004.[2] The record also contains a 3-year, 2001 computer technology diploma and transcripts in the Beneficiary's name from the [redacted] India.

The Petitioner submitted an evaluation of the Beneficiary's foreign educational credentials concluding that he has the equivalent of a U.S. bachelor of science degree in computer science. The evaluation states that the Beneficiary's receipt of the 2001 diploma allowed him to complete the 4-year bachelor of engineering program in 3 years.

In response to the Director's notice of intent to deny of April 10, 2015, the Petitioner also submitted a written expert opinion regarding the Beneficiary's foreign educational credentials. The opinion states that the Beneficiary has the equivalent of a U.S. bachelor of science in computer engineering and that his 3-year technical program provided him with 1 year of transfer credit towards the 4-year baccalaureate program.

The Director found that the record did not establish the Beneficiary's possession of a single, 4-year bachelor's degree. The Director therefore concluded that the record did not establish his qualifications for the requested classification and the offered position.

The Director correctly stated that advanced degree equivalents must generally consist of single, 4-year bachelor's degrees. U.S. bachelor's degrees generally require 4 years of study. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). Also, the plain language of the regulations indicates that baccalaureate degrees based on combinations of degrees, or combinations of education and experience, are unacceptable. As previously indicated, the term "advanced degree" includes a U.S. "baccalaureate degree or foreign equivalent degree" followed by at least 5 years of progressive experience in the specialty. The repeated use of the term "degree" in singular number suggests the acceptance of only a single degree or its foreign equivalent.

In addition, the Act's legislative history indicates that baccalaureate equivalents based on combinations of lesser educational credentials, or combinations of education and experience, are unacceptable. In response to public criticism that the regulations bar the substitution of experience for baccalaureate education in immigrant visa petitions, the former Immigration and Naturalization Service (INS) reviewed the Immigration Act of 1990, Pub. L. 101-649. The INS concluded that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." Final Rule for Immigrant Visa Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

[2] The diploma is from the [redacted] in India. But the record contains a copy of a 2004 completion certificate from [redacted] as stated on the labor certification, indicating the institute's affiliation with the university at that time.

The accompanying labor certification also indicates that the offered position requires a single baccalaureate degree or a single foreign equivalent degree. In Part H.4 of the ETA Form 9089, the Petitioner indicated the minimum level of required education as a "[b]achelor's" degree, rather than some "[o]ther" degree equivalent. In Part H.8 of the form, the Petitioner also indicated that "[n]o" alternate combination of education and experience was acceptable.

But, contrary to the Director's decision, the record establishes the Beneficiary's possession of a single, foreign degree equivalent to a U.S. bachelor's degree. The record indicates that the Beneficiary's bachelor of engineering degree equates to a 4-year, U.S. bachelor's degree in a field specified on the labor certification.

The record indicates that, after 10 years of schooling, the Beneficiary pursued post-secondary, technical education in computer technology. His 3-year technical diploma allowed his admission into the second year of a 4-year bachelor of engineering program at a university. The record indicates that the [redacted] in 2007 issued regulations adopting this type of "lateral entry" into university engineering and technology programs on a nationwide basis. *See The Gazette of India*, Reg. No. D.L. 33004/99 (Jan. 12, 2007).

The Electronic Database for Global Education (EDGE), which federal courts have found to be a reliable, peer-reviewed source of information about foreign degree equivalencies, does not evaluate an Indian post-secondary diploma specifically in computer technology.[3] EDGE states that 3-year post-secondary diplomas in India generally equate to 1 year of university study in the United States. *See* http://edge.aacrao.org/country/credential/post-secondary-diploma?cid=single (last visited Oct. 7, 2016). EDGE further states that the Beneficiary's bachelor of engineering degree "represents attainment of a level of education comparable to a bachelor's degree in the United States." http://edge.aacrao.org/country/credential/bachelor-of-engineeringtechnology?cid=single (last visited Oct. 7, 2016).

The Beneficiary's post-secondary studies are analogous to a transfer from one undergraduate school to another, or a U.S. student's transfer from a community college to a university. Although the Beneficiary studied only 3 years at the university that issued his baccalaureate diploma, the record shows that his degree reflects 4 years of undergraduate studies.

As required for advanced degree classification and as specified by the accompanying labor certification, the record establishes the Beneficiary's possession of a foreign equivalent of a U.S.

[3] EDGE was created by the American Associate of Collegiate Registrars and Admissions Officers (AACRAO), a non-profit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals representing more than 2,600 institutions worldwide. *See* Am. Assoc. of Collegiate Registrars & Admissions Officers, at http://www.aacrao.org/About-AACRAO.aspx (last visited Oct. 7, 2016). EDGE is "a web-based resource for the evaluation of foreign educational credentials." *Id.*, at http://edge.aacrao.org/info.php; *see also Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (holding that USCIS may discount letters and evaluations submitted by a petitioner if they differ from reports in EDGE, which is "a respected source of information").

bachelor's degree in a field specified on the labor certification. We will therefore withdraw the Director's contrary finding.

C. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In determining ability to pay, we first examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay any difference between the wages paid and the annual proffered wage. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa,* 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).[4]

In the instant case, the accompanying labor certification states the proffered wage of the offered position of computer systems analyst as $97,822 per year. The petition's priority date is July 14, 2014, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The record contains a copy of an IRS Form W-2, Wage and Tax Statement. The Form W-2 indicates that the Petitioner paid the Beneficiary $81,000 in 2014. The amount on the Form W-2 does not equal or exceed the annual proffered wage of $97,822. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on its payments to the Beneficiary.

But we credit the Petitioner's payments to the Beneficiary. In 2014, the Petitioner must demonstrate its ability to pay the difference between the annual proffered wage and the payments to the Beneficiary, or $16,822.

A copy of the Petitioner's federal income tax return for 2014 reflects annual net income of $1,149,041.[5] Because this amount exceeds the difference between the annual proffered wage and

[4] Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015).

[5] The return indicates the Petitioner's treatment for federal income tax purposes as an S corporation. S corporations state income adjustments from sources other than their trades or businesses on Schedule K to IRS Form 1120S, U.S. Income Tax Return for an S Corporation. Because the Petitioner reported income adjustments from sources other than its business in 2014, we consider line 18 of its 2014 Schedule K to reflect net income. *See* Internal Revenue Serv., Instructions for Form

the payments to the Beneficiary, the record appears to establish the Petitioner's ability to pay the proffered wage in 2014.

But USCIS records indicate the Petitioner's filing of at least 29 Forms I-140, Immigrant Petitions for Alien Workers, for other beneficiaries after the instant petition's priority date.[6]

A petitioner must demonstrate its continuing ability to pay the proffered wage of each petition it files from the petition's priority date. 8 C.F.R. § 204.5(g)(2). The instant Petitioner must therefore establish its continuing ability to pay the combined proffered wages of the instant Beneficiary and the other beneficiaries of the petitions that were filed after the instant petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our denial of a petition where a petitioner did not demonstrate its ability to pay multiple beneficiaries).

The instant record does not document the priority dates or proffered wages of the Petitioner's other petitions, or whether it paid wages to the other beneficiaries. The record also does not indicate whether any of the other petitions were withdrawn, revoked, or denied, or whether any of the other beneficiaries obtained lawful permanent residence. Without this information, the record does not establish the Petitioner's continuing ability to pay the proffered wage.

Because the record does not establish the Petitioner's ability to pay the proffered wage, we will remand the matter to the Director.

II. CONCLUSION

The record establishes the Beneficiary's possession of the educational qualifications for the offered position and the requested classification. We will therefore withdraw the Director's decision. But the petition is not approvable. We will therefore remand the matter to the Director for further proceedings.

On remand, the Director should notify the Petitioner of additional evidence needed to demonstrate its ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its

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1120S, at http://www.irs.gov/pub/irs-pdf/i1120s.pdf (accessed July 7, 2016) (describing Schedule K as a summary schedule of shareholders' portions of a business's income, deductions, credits, etc.).

[6] USCIS records identify the other petitions by the following receipt numbers: [redacted] and [redacted] The labor certification indicates that the Petitioner employs 90 workers. The Form I-140 indicates that it employs 101 workers. The record does not contain a statement from a financial officer of the Petitioner indicating its employment of 100 or more workers and establishing its ability to pay the proffered wage. 8 C.F.R. § 204.5(g)(2).

petitions filed after the instant petition's priority date. The Director should also request required evidence of the Petitioner's ability to pay in 2015 and notify the Petitioner that it may submit additional evidence of its ability to pay, including evidence pursuant to *Sonegawa*.

The Director may also request evidence addressing any other issues he may identify. He should afford the Petitioner a reasonable opportunity to respond. Upon receipt of the Petitioner's response, the Director should review the entire record and enter a new decision.

ORDER: The matter is remanded to the Director, Texas Service Center, for further proceedings consistent with the foregoing decision and for the entry of a new decision.

Cite as *Matter of M-T-, LLC*, ID# 123571 (AAO Oct. 12, 2016)